



BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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IN THE MATTER OF THE
APPLICATION OF ARIZONA
WATER COMPANY TO EXTEND
ITS CERTIFICATE OF
CONVENIENCE AND NECESSITY
IN CASA GRANDE, PINAL
COUNTY, ARIZONA.

DOCKET NO. W-01445A-03-0559

**CORNMAN TWEEDY 560 LLC'S
RESPONSE TO STAFF'S LEGAL
MEMORANDUM**

In accordance with the Procedural Order dated November 23, 2005, in this docket, Intervenor Cornman Tweedy 560, LLC ("Cornman Tweedy"), by and through its counsel undersigned, files its response (the "Response") to the Legal Memorandum filed by Utilities Division Staff ("Staff") on November 22, 2005.

I. BACKGROUND

In Decision 66893 (April 6, 2004), the Arizona Corporation Commission ("Commission") conditionally approved the extension of the Certificate of Convenience and Necessity ("CC&N") of Arizona Water Company ("AWC") to include eleven square miles in Township 6 South, Range 7 East, G&SRB&M, in Pinal County, Arizona. Although AWC's requested extension area—the area conditionally approved by the Commission—covered eleven square miles, AWC identified only two requests for service in its application: a request from Harvard Investments for a development covering 480 acres and a request from Core Group Consultants, Ltd., for a development covering 240

1 acres to be known as Florence Country Estates. These two developments are the only
2 developments referenced in Decision 66893.

3 In order for AWC's conditional extension to become permanent, AWC was
4 required to fulfill two conditions:

5 1. File a copy of the developer's assured water supply for each respective
6 development within 365 days of the decision; and

7 2. File a main extension agreement associated with the extension area within
8 365 days of the decision.

9 If AWC failed to fulfill these two conditions within the one-year period, then
10 Decision 66893 "is deemed null and void without further Order of the Arizona
11 Corporation Commission." The "null and void" language was recommended by Staff in
12 its Staff Report and adopted by the Commission in the decision. Decision 66893 at page
13 3, lines 11-13, and page 7, lines 7-9; Staff Report dated January 9, 2004, at p. 4.

14 AWC failed to fulfill either condition of Decision 66893 within the one-year time
15 period for compliance, and to this day, has not fulfilled the conditions.¹ Instead, AWC
16 filed a Request for Additional Time to Comply with Filing Requirement ("Request for
17 Additional Time") one week prior to the deadline for compliance. The Request for
18 Additional Time stated that Harvard Investments and Core Group Consultants informed
19 AWC that development would be delayed for another year, and AWC requested a one-
20 year extension of the deadline for compliance. AWC stated that no one would be
21 prejudiced by the request because AWC was the only applicant for the areas to be served
22 (a fact that is no longer the case). The explanation regarding AWC's request was set forth
23 in a single paragraph, was not supported by any documentation from the developers, and
24

25 ¹ It is not clear from Decision 66893 whether the requirements that AWC file copies of the developer's assured water
26 supplies and main extension agreements applied only to the developments of Harvard Investments and Core Group
Consultants, or whether they applied to the entire eleven-square-mile extension area. In either case, AWC has not
made any compliance filing in this docket.

1 did not address the status of compliance in the remaining nine square miles of the
2 requested extension area.

3 The Request for Additional Time was not acted upon by the Commission prior to
4 the expiration of the one-year period for compliance, rendering Decision 66893 null and
5 void. Following the nullification and voidance of AWC's CC&N, Picacho Water
6 Company ("Picacho") submitted an application to extend its CC&N to include a portion of
7 the territory previously covered by Decision 66893. Picacho's extension request includes
8 approximately 2 of the 11 sections (1,138 acres of land) conditionally granted to AWC.
9 Cornman Tweedy, the current owner of the 1,138 acres of land, filed a motion to intervene
10 in this docket which was approved in a Procedural Order dated November 14, 2005. In a
11 prior Procedural Order dated September 28, 2005, the Commission's Chief Administrative
12 Law Judge directed Staff to file a legal brief "on the issue of whether the CC&N extension
13 of AWC is void pursuant to Decision No. 66893." Staff's Legal Memorandum was filed
14 on November 22, 2005.² Cornman Tweedy submits its Response to the Staff Legal
15 Memorandum.

16 II. DISCUSSION

17 A. The Commission Has Authority to Issue Decisions Requiring Public Service 18 Corporations to Meet Specified Conditions.

19 The Commission may require "as a condition subsequent to its order granting a
20 certificate" that a corporation satisfy any of a variety of conditions. City of Tucson v.
21 Arizona Corporation Commission, 1 Ariz. App. 110, 112 (Ct. App. 1965). This practice
22 allows the Commission to approve "a CC&N for a given territory subject to compliance
23 with certain conditions set forth in the Order." In re Arizona Utility Supply & Services,
24 L.L.C., Decision No. 67586 (quoting In re Utility Source, L.L.C., Decision No. 67446).
25 "Under the Conditional CC&N policy, no further action by the Commission is necessary
26

² Staff filed the same memo in the Picacho Docket (W-03528A-05-0281) on October 14, 2005. This memo was filed in this docket at the request of ALJ Farmer.

1 because the CC&N automatically becomes effective upon satisfaction of the conditions,
2 or becomes null and void if the conditions are not met within the time period designated in
3 the Order.” In re Arizona Utility Supply & Services, L.L.C., Decision No. 67586
4 (emphasis added) (quoting In re Utility Source, L.L.C. (Decision No. 67446)).

5 In City of Tucson, the Arizona Court of Appeals held that the Commission had
6 authority to issue a CC&N requiring M.M. Sundt Construction Company (“Sundt”) to
7 comply with various conditions subsequent to the granting of its certificate. 1 Ariz. App.
8 at 112. Specifically, Sundt had to “obtain required approval ... to construct, install,
9 operate and maintain a water system which shall include a franchise authorizing the use of
10 public roads or lands for such purposes.” In re M.M. Sundt Construction Co., Decision
11 No. 33081 (1961). The decision granting the CC&N, however, did not specify what
12 would happen upon failure to satisfy a condition. Id. Thus, the Sundt case is
13 distinguishable from this case where Decision 66893 clearly specifies what happens if the
14 conditions are not fulfilled.

15 In Utility Source, the Commission specifically acknowledged the procedural effect
16 of the “null and void” language, making it clear that failure to satisfy the conditional
17 CC&N’s conditions would lead to its automatic nullification and avoidance. In re Utility
18 Source, L.L.C., Decision No. 67446 at 8-9. There, the applicants sought a conditional
19 CC&N for the first phase of a project and an order preliminary for the second phase. Id.
20 at 9. The Commission granted the conditional CC&N, but only after outlining the factors
21 that would lead to the CC&N’s *automatic* nullification and avoidance upon failure to
22 satisfy the enumerated conditions. Id. at 17.

23 Cornman Tweedy agrees with Staff’s assertion that the Commission may issue
24 conditional CC&Ns. However, the conditional CC&N granted in this case gives AWC a
25 far different interest than the one granted to Sundt in City of Tucson. The decision in City
26 of Tucson granted a conditional CC&N, but did not contain express language to put Sundt
on notice that the CC&N would be null and void if the condition was not satisfied.

1 However, in Decision 66893, the Commission included language specifically stating that
2 the Certificate was *automatically* "null and void" upon failure to fulfill the conditions.

3 Indeed, AWC itself recognizes that a conditional CC&N is automatically null and
4 void if the conditions attached to the CC&N are not satisfied. AWC President William
5 Garfield, in a letter that was filed with the Commission in a generic docket, urged "the
6 commission to consider issuing orders of approval that are not conditioned, or, in
7 particular, that do not include conditions for that authority granted to *automatically* expire
8 upon the passing of a particular time line, e.g., 365 days." Letter from William M.
9 Garfield to Chairman Jeff Hatch-Miller dated May 18, 2005 (Docket ACC-00000C-05-
0037) (emphasis added).

10 Staff cites Application of Trico Elec. Coop., Inc. as the basis for concluding that
11 AWC must have notice and an opportunity to be heard before Decision 66893 is rendered
12 null and void. In Trico, the Arizona Supreme Court held that the Commission had a duty
13 to protect the exclusive right of a public service corporation to operate in the area where it
14 rendered service under its certificate. Application of Trico Elec. Coop., Inc., 92 Ariz. 373,
15 387 (1962). Trico had petitioned the Commission for a metes and bounds delineation of
16 its existing operating area. Id. at 379. At the same time, Tucson Gas, Electric Light &
17 Power Company ("Tucson Gas"), a competing public service corporation under the
18 Commission's jurisdiction, sought to expand its certificated territory into the general area
19 served by Trico. Id. at 380. In a decision dated August 10, 1962, the Commission
20 awarded the overlapping area to Tucson Gas, "apparently under the theory that it could, in
21 that proceeding, without appropriate notice and other procedural requirements, readjust
22 existing boundaries and reapportion existing operating territory, to effect more congruous
23 areas, for future operation and expansion of the respective companies." Id. Under those
24 circumstances, the court concluded that the Commission had exceeded its jurisdiction.

25 This case is clearly distinguishable from Trico as the territory in question in Trico
26 was already certificated to Trico. Certainly, Trico was entitled to notice and a hearing

1 before existing territory could be withdrawn. However, AWC did not obtain a fully
2 vested right to serve the requested extension area in Decision 66893. Rather, AWC had
3 the opportunity to obtain such a vested right upon fulfillment of the two conditions
4 contained in the decision. AWC had its notice and procedural due process at the time
5 Decision 66893 was approved. Under a conditional decision, the public service
6 corporation's interest remains unvested—subject to nullification and avoidance—until the
7 conditions are fulfilled. See, In re Arizona Utility Supply & Services, L.L.C., Decision
8 No. 67586; see also, In re Utility Source, L.L.C., Decision No. 67446.

9 It should be noted that the cases Staff cites in its memo—Trico and City of
10 Tucson—were decided over forty years ago. In contrast, the decisions that Cornman
11 Tweedy relies upon were decided in 2005. All five current Commissioners were on the
12 Commission when both Utility Source and Arizona Utility Supply & Services were
13 decided. In addition, the cases cited by Staff are easily distinguishable from the instant
14 case since Trico involved the attempted withdrawal of the vested territory of Trico and
15 City of Tucson did not include null and void language.

16 Therefore, consistent with the Commission's decisions in Utility Source and
17 Arizona Utility Supply & Services, Decision 66893 became null and void on April 6,
18 2005, as a result of AWC's failure to timely satisfy the conditions set forth in the decision.
19 AWC had proper notice and an opportunity to be heard regarding the self-executing
20 nullification language at the time the decision was issued. The fact that AWC filed a
21 request to extend the deadline for compliance one week prior to the expiration of the
22 deadline does not save AWC from the operation of the plain language of the decision.
23 Certainly, AWC knew that the Commission could not act on such a request in one week.
24 AWC could have and should have filed a timely request for extension.
25
26

1 **B. A Company's Interest in its CC&N is Limited to the Interest Conveyed by the**
2 **Commission in the Decision Granting the CC&N.**

3 "The Commission's power to grant, amend or cancel certificates of convenience
4 and necessity is limited to that expressly granted by the Constitution and laws of
5 Arizona." Application of Trico Elec. Coop., Inc., 92 Ariz. at 381. Pursuant to those laws,
6 the Commission can either issue a CC&N or decline to do so. ARIZ. REV. STAT. § 40-
7 282(C). Additionally, the Commission may issue the certificate permitting construction
8 on only a portion of the area contemplated. Id. Moreover, the Commission may issue a
9 CC&N for only the partial exercise "of the right or privilege, and may attach to the
10 exercise of rights granted by the certificate *terms and conditions* it deems that the *public*
11 *convenience and necessity require.*" Id. (emphasis added).

12 Unlike the instant case, the court in Trico was not attempting to address the status
13 of a public service corporation's CC&N upon failure to satisfy conditions. Trico had a
14 vested right, and its CC&N was never subject to automatic nullification and avoidance.
15 Conversely, the Commission in this case conditionally granted AWC's extension request,
16 and the ability to make that grant permanent was always conditioned upon AWC's
17 fulfillment of the conditions attached to the decision.

18 In this case, AWC received less than a fully vested CC&N in Decision 66893.
19 What AWC received was the opportunity to obtain a fully vested CC&N by timely
20 fulfilling the conditions attached to the decision. The express language appropriately
21 attached to the grant is both lawful and effective, and results in the nullification and
22 avoidance of the CC&N in the event that the conditions are unfulfilled. AWC accepted the
23 decision with full knowledge—after notice and a hearing—of the conditions attached.
24 AWC's failure to fulfill the attached conditions automatically rendered the CC&N null
25 and void when the deadline expired.
26

1 AWC has had notice and a hearing. Unlike Trico, where the Commission was
2 attempting to withdraw a vested CC&N, Cornman Tweedy is asking the Commission to
3 *enforce* the provisions of Decision 66893 as written.

4 **C. Self-Executing Language Automatically Rendering a CC&N Null and Void**
5 **for Failure to Satisfy Attached Conditions is Valid and Enforceable.**

6 Generally, the Commission may, “upon notice to the corporation affected, and after
7 opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision
8 made by it.” ARIZ. REV. STAT. § 40-252; see also, James P. Paul Water Co. v. Arizona
9 Corporation Commission, 137 Ariz. 426, 430 (1983). However, “[i]n all collateral actions
10 or proceedings, the orders and decisions of the commission which have become final shall
11 be conclusive.” ARIZ. REV. STAT. § 40-252. For purposes of determining finality, orders
12 that express the Commission’s intent with certainty and a lack of ambiguity are
13 considered final. City of Tucson, 1 Ariz. App. at 111. Moreover, any action seeking to
14 disprove the finality of an unambiguous order, “is, in effect, an attack thereon, and being a
15 collateral one, is barred” Id.

16 In James P. Paul, the court found that public interest requires that a “corporation be
17 allowed to retain its certificate until it is unable or unwilling to provide needed service at a
18 reasonable rate.” 137 Ariz. at 430. There the Commission deleted a portion of James P.
19 Paul Water Company’s (“Paul”) CC&N service area. Id. at 428. The court determined
20 that Paul was entitled to, and the public interest required, notice and a hearing prior to the
21 deletion of its certificated area. Id. at 431.

22 In City of Tucson, the court held that the decision issuing Sundt’s conditional
23 CC&N was unambiguous. 1 Ariz. App. at 111. There, the court found that the
24 Commission specifically identified the decision as a CC&N. Id. In light of the certainty
25 in the Commission’s statement, the court concluded that the City of Tucson’s “declaratory
26 judgment action seeking to hold the decision to be only a preliminary order, with no
finality” was a collateral attack. Id. Moreover, the court determined that such a collateral

1 attack on a final and conclusive decision issuing a conditional CC&N was not permitted.
2 Id.

3 In the instant case, the Commission issued a decision granting AWC's application
4 to extend its CC&N. Decision No. 66893 at 6. However, unlike James P. Paul, the issue
5 here pertains to the self-executing language of the Commission's decision, *not* the
6 procedural due process required for vested CC&Ns. Unlike the circumstances in James P.
7 Paul, AWC's interest in the extension area had not fully vested because AWC failed to
8 timely satisfy the conditions expressly contained in the Commission's decision.
9 Accordingly, AWC is not entitled to the same right to notice and hearing that it provides
10 to public service corporations with non-conditioned CC&Ns.

11 Moreover, as in City of Tucson, the Commission's decision was subject to certain
12 enumerated conditions. In re Arizona Water Company, Decision No. 66893 at 6-7.
13 Although the City of Tucson decision and the decision in this case contain different
14 language with regard to the conditions, they each unambiguously express the
15 Commission's intent to create and to extend each entity's CC&N. It is this resounding
16 characteristic of certainty that renders each decision final and precludes collateral attack.

17 Similar to City of Tucson, AWC is attempting to disprove the finality of the
18 Commission's decision. Staff asserts that AWC has a right to notice and an opportunity to
19 be heard prior to the nullification and avoidance of its conditional CC&N. However, as
20 can be inferred from City of Tucson, the Commission gives notice and an opportunity to
21 be heard prior to the issuance of a conditional CC&N. AWC's failure to timely fulfill the
22 conditions attached to its conditional CC&N resulted in the automatic nullification and
23 avoidance of its CC&N; nowhere in the case law or the statutes does AWC have a right to a
24 second bite at the apple. Therefore, the Commission must abide by and *enforce* its ruling.
25
26

D. The Commission's Failure to Adhere to the Express Language of its Decisions Would Undermine Good Regulatory Policy.

For many years, this Commission has granted CC&Ns subject to conditions subsequent—many of which provide for automatic nullification and avoidance if the conditions are not satisfied. See e.g., In re UCN, Inc., Decision No. 67979 (2005); In re Global Connection, Inc., Decision No. 67981 (2005); In re Oak Creek Public Service Co., Decision No. 67985 (2005); In re Phone1, Inc., Decision No. 67988 (2005); In re Arizona Water Co., Decision No. 67826 (2005). Counsel undersigned has found literally dozens of decisions which contain "null and void" language identical to that found in Decision 66893. This practice, however, is not limited to Arizona. See e.g., In re Trans National Telecommunications, Inc., 2001 WL 1916619 (Mo. Public Serv. Comm'n 2001) (withdrawing conditional approval of certificate of service authority); In re Frontier Utilities, 1997 WL 197331 (N.C. Utilities Comm'n 1997) (granting conditional certificate that expires and becomes null and void upon failure to satisfy the conditions); Public Serv. Comm'n of Nevada v. Community Cable TV, 91 Nev. 32 (1975) (automatically rendering CC&N null and void if company fails to file required FCC licensing).

In effect, Staff asserts in its Legal Memorandum that the Commission's inclusion of "null and void" language in Decision 66893 and countless prior decisions is meaningless and of no effect. This is a dangerous argument for Staff to make, and one which opens wide Pandora's Box. Commission decisions are the vehicles through which the Commission acts. Public service corporations and the public must be able to rely on the plain language of those decisions. Staff's declaration that the "null and void" language is meaningless creates ambiguity in the many prior Commission decisions which contain that language. More importantly, declaring the language ineffective will encourage public service corporations to ignore the conditions attached to conditional CC&Ns, because they know that the decisions cannot be nullified without further proceedings by the Commission. It is unlikely that the Commission has sufficient time and resources to hold

1 additional hearings on all of the conditional grants of authority. In essence, Staff appears
2 to be moving the Commission back to orders preliminary.

3 This Commission cannot and should not concede that the plain language of its
4 decisions does not mean what it says. Unless Staff can clearly demonstrate that the
5 Commission has long been violating the Arizona Constitution, established case law or the
6 statutes of this State by including "null and void" language in its decisions, then the plain
7 language of Decision 66893 should be enforced as written. Staff's one-page analysis in its
8 Legal Memorandum on this issue does not establish the invalidity or unlawfulness of the
9 "null and void" language.

10 **III. CONCLUSION**

11 For the foregoing reasons, Cornman Tweedy respectfully submits that the "null and
12 void" language of Decision 66893 is lawful and effective, and that AWC's failure to
13 timely fulfill the conditions attached to Decision 66893 had rendered the decision null and
14 void without the need for any additional action by the Commission.

15 RESPECTFULLY SUBMITTED this 19th day of December, 2005.

16 

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